The Five Types of Legal Argument

THIRD EDITION

Wilson Huhn

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for
Nancy, Jesse, Niki, Missy, and David
Contents

Preface xi
Preface to the Second Edition xiii
Preface to the Third Edition xv

Introduction · The Voices of the Law 3

Chapter 1 · The Purpose of Legal Education 7

Chapter 2 · The Five Types of Legal Arguments 13
  1. The Five Types of Legal Argument Arise from Different Sources of Law 13
  2. The Five Types of Legal Argument Function as Rules of Recognition 13
  3. The Five Types of Legal Argument Are Rules of Evidence for Determining What the Law Is 14
  4. The Five Types of Legal Argument Embody the Underlying Values of Our System of Laws 15

Chapter 3 · Text 17
  1. Plain Meaning 19
  2. Canons of Construction 22
  3. Intratextual Arguments 25

Chapter 4 · Intent 31
  1. The Intent Behind the Constitution, Statutes, Regulations, Contracts, and Wills 31
  2. Evidence of Intent 34
    a. Evidence of Intent in the Text Itself 34
CONTENTS

b. Previous Versions of the Text 35
c. The History of the Text 37
d. Official Comments 38
e. Contemporary Commentary 39

Chapter 5 · Precedent 41

Chapter 6 · Tradition 45

Chapter 7 · Policy 51
1. The History of Policy Arguments 53
2. The Structure of Policy Arguments 63
   a. The Predictive Statement 63
   b. The Evaluative Judgment 67

Chapter 8 · Identifying the Five Types of Legal Arguments 71

Chapter 9 · Creating Persuasive Arguments 85

Chapter 10 · How to Attack Legal Arguments 93

Chapter 11 · Intra-Type Attacks on Textual Arguments 97
A. Intra-Type Attacks on Plain Meaning Arguments 97
   1. The Text Is Ambiguous 97
   2. The Text Has a Different Plain Meaning 100
B. Intra-Type Attacks on the Canons of Construction 101
   3. The Canon of Construction Does Not Apply 101
   4. A Conflicting Canon of Construction Applies 102
C. Intra-Type Attacks on Intratextual Arguments 103
   5. There Is a Conflicting Intratextual Inference Drawn from the Same Text 103
   6. There Is a Conflicting Intratextual Inference Drawn from Different Text 104

Chapter 12 · Intra-Type Attacks on Intent Arguments 107
7. The Intent Was Different 107
8. The Evidence of Intent Is Not Sufficient 109
9. The Framers of the Law Did Not Anticipate Current Conditions 111
10. The Person Whose Intent Was Proven Did Not Count 111

Chapter 13 · Intra-Type Attacks on Precedent Arguments 115
11. The Court’s Opinion Was Not Holding but Rather Obiter Dictum 115
12. The Opinion Did Not Command a Majority of the Court 117
13. The Opinion Was Not Issued by a Controlling Authority 119
14. The Case Is Distinguishable Because of Dissimilar Facts 119
15. The Case Is Distinguishable for Policy Reasons 122
16. There Are Two Conflicting Lines of Authority 125
17. The Case Has Been Overruled 126
18. The Case Should Be Overruled 127

Chapter 14 · Intra-Type Attacks on Tradition Arguments 131
19. No Such Tradition Exists 131
20. There Have Been Competing Traditions 132
21. A New Tradition Is Emerging 133

Chapter 15 · Intra-Type Attacks on Policy Arguments 135
22. The Factual Prediction Is Not Accurate 135
23. The Policy Is Not One of the Purposes of the Law 137
24. The Policy Is Not Sufficiently Strong 141
25. The Policy Is Not Served in This Case 142
26. The Policy Is Outweighed by a Competing Policy 143

Chapter 16 · Cross-Type Arguments 147

Chapter 17 · Foundational Cross-Type Arguments 149

Chapter 18 · Relational Cross-Type Arguments 155
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>19</td>
<td>Text versus Intent</td>
<td>163</td>
</tr>
<tr>
<td>20</td>
<td>Precedent versus Policy</td>
<td>169</td>
</tr>
<tr>
<td></td>
<td>1. Jacob &amp; Youngs v. Kent</td>
<td>169</td>
</tr>
<tr>
<td></td>
<td>2. Denver Area Educational Telecommunications Consortium v. F.C.C.</td>
<td>173</td>
</tr>
<tr>
<td>21</td>
<td>Text versus Policy</td>
<td>179</td>
</tr>
<tr>
<td></td>
<td>1. Text versus Policy in the Law of Negotiable Instruments</td>
<td>179</td>
</tr>
<tr>
<td></td>
<td>2. Text versus Policy in Separation of Powers Cases</td>
<td>182</td>
</tr>
<tr>
<td>22</td>
<td>Text versus Precedent</td>
<td>189</td>
</tr>
<tr>
<td>23</td>
<td>A Logical Demonstration of the Theory of the Five Types of Legal Argument</td>
<td>193</td>
</tr>
<tr>
<td>24</td>
<td>Reasoning by Analogy Is the Bridge Between Formalism and Realism</td>
<td>201</td>
</tr>
<tr>
<td></td>
<td>1. From Formalism to Realism in the Gestational Surrogacy Cases</td>
<td>203</td>
</tr>
<tr>
<td>25</td>
<td>Discovering a Court’s Judicial Philosophy and Your Own Philosophy of Life</td>
<td>217</td>
</tr>
<tr>
<td></td>
<td>Index to Authors and Judges</td>
<td>221</td>
</tr>
<tr>
<td></td>
<td>Index to Cases</td>
<td>225</td>
</tr>
<tr>
<td></td>
<td>Topical Index</td>
<td>227</td>
</tr>
</tbody>
</table>
Preface

This book was written for students entering law school, so that from the first day they might appreciate what makes legal reasoning so fascinating and so difficult. I have presumed that the reader has a general knowledge of the American system of government and court system. I have used a sprinkling of specialized terms that are either defined in the text or that may be clarified by reference to a legal dictionary. It is my hope that this volume will also prove useful to attorneys and judges who may wish to consciously reflect upon the analytical skills that have become second nature to them.


I would like to thank my editor, Melissa Ulrich, Assistant Professor and Lead Faculty, Paralegal Studies, at The University of Akron for her many improvements to the text. I am also grateful to Judge Sam Bell and to several of my colleagues at The University of Akron School of Law, including Dean Richard L. Aynes, Associate Deans Elizabeth Reilly and Malina Coleman, and Professors Jane Moriarty, Samuel Oddi, Richard Cohen, Tracy Thomas, William Jordan, and Lloyd Anderson, for their valuable substantive and editorial suggestions. Finally, I would like to thank my research assistants, Matthew Hudson and Patrick Walsh, for their invalu-
able assistance. All errors and material omissions are, of course, my sole responsibility.

Above all, I am indebted to my wife and children for their love and support, and I dedicate this book to them.

Wilson Huhn
Preface to the Second Edition

Among other changes, this edition of The Five Types of Legal Argument adds a new chapter, Chapter 23, setting forth a logical demonstration of the theory of the five types of legal arguments. This chapter demonstrates that the “brief” of a case takes the form of an argument of deductive logic, but that the different types of legal arguments are not the creatures of logic, but rather are the assumptions upon which all legal reasoning is based. This new chapter is based upon research originally published in the article The Use and Limits of Syllogistic Reasoning in Briefing Cases, 42 Santa Clara Law Review 813 (2002). I again wish to acknowledge the fine work of the editors and staff of the Santa Clara Law Review for their assistance in bringing that article to publication.

The most significant substantive change to the theory is contained in Chapter 10 of this edition where I have added two additional types of “intra-type” attacks on legal arguments. The first change is that I have identified another method of attacking intent arguments, and it is exemplified in two speeches by Abraham Lincoln. In addition, I have described another way of attacking tradition arguments that was employed by Justice Anthony Kennedy in the case of Lawrence v. Texas.

This edition updates references to Regents v. Bakke and Bowers v. Hardwick in light of the 2003 decisions of the Supreme Court in Grutter v. Bollinger and Lawrence v. Texas. In particular, the newer cases make contributions to our understanding of how to make and attack arguments based upon precedent and tradition.

I am grateful to the many law students, law professors, lawyers, and judges who have found this book to be useful in their pursuit of a deeper understanding of and facility with legal reasoning, as
well as to those many persons who have made helpful suggestions for improving this book.

Wilson Huhn
Preface to the Third Edition

The principal change that is made in the third edition of this book is the addition of a new chapter (now numbered Chapter 24) describing how reasoning by analogy is the bridge between formalism and realism. The material in this new chapter will assist lawyers and judges to construct legal arguments in increasingly difficult cases. This chapter is a condensed version of the jurisprudential theory set forth in the article *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 Villanova Law Review 305–380 (2003). I wish to acknowledge and thank the editors of the Villanova Law Review for their technical assistance and editorial advice that made many valuable improvements to that article, and hence to the new chapter of this book.

Other changes and clarifications are sprinkled throughout this new edition, yet the essential theme remains intact. Lawyers, judges, legal educators and law students construct legal arguments that follow certain patterns and that draw on characteristic types of data. These types of arguments may be classified under the categories of text, intent, precedent, tradition, and policy. This paradigm helps us both to understand the law and to practice the profession of law.

As always, I am grateful to my wife, Dr. Nancy Wollam-Huhn, for her love and support all these many years.

Wilson Huhn
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